SUPREME COURT, U. S.
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No. 73-408

In the Supreme Court of the United States

OCTOBER TERM, 1973

VALERIO SANTOS AND SALVADOR G. SANTOS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The questions raised are whether the evidence was sufficient and whether the trial court erred in not giving a cautionary instruction on its own motion as to alleged accomplice testimony.

After a jury trial, petitioners were convicted of conspiracy, in violation of 18 U.S.C. 371, and of various violations of the Gun Control Act of 1968, 18 U.S.C. 922, *et seq.* Valerio Santos was sentenced to a fine of $5,000 and two years imprisonment on each of Counts One through Twelve, and a fine of $10,000 on Count Sixteen, the sentences to be concurrent. Salvador G. Santos was sentenced to a fine of $1,000 and two years imprisonment on each of Counts Thirteen through Sixteen, the sentences to be concurrent; the court suspended all but six months of the jail sentence and placed him on probation for three years. The court of appeals affirmed (Pet. App. 3a-4a).

I. Petitioners contend that there was insufficient evidence to sustain the convictions. Viewing the evidence in a light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, it was wholly sufficient.

Oscar Garcis Mata testified that he accompanied an individual dressed in an official Mexican uniform to petitioners' store (T. 24).[1] The Mexican man paid for and received the weapon directly from Valerio Santos (T. 27-28). However, Mata signed the Firearms Transaction Record which reflected that he purchased a pistol (T. 26). Mata further testified as to two similar transactions involving himself, the Mexican, and Valerio Santos (T. 28-29). This evidence established that Valerio Santos knowingly sold a weapon to a person he knew or had reasonable cause to believe did not reside in Texas (Count One, 18 U.S.C. 922(b)(3)). Since the Firearms Transaction Record did not contain information about the actual purchases, Valerio Santos failed to keep the required records concerning the sale (Count Two, 18 U.S.C. 922(b)(5)). And because the record showed that someone other than the actual purchaser bought the weapon, Valerio Santos made a false record (Count Three, 18 U.S.C. 922(m)).

Aldofo Valdez (Counts Four, Five, Six; T. 45-46) and Francisco Mejia (Counts Seven, Eight, and Nine; T. 55-61) testified as to similar transactions involving Mexicans and Valerio Santos. Mejia testified as to 10 or 11 similar purchases not charged in the indictment (T. 73-74). Benito Perez testified that he attempted to purchase a weapon from Valerio Santos, but was informed that since he was a resident of Illinois, he would need

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[1] The store was owned by Valerio Santos; his son, Salvador, worked there (T. 279-280); "T." refers to the transcript of the proceedings in the trial court.

someone with a Texas driver's license to sign the form (T. 85-86). Later he brought with him Ramon Grimaldo and a purchase was completed in the manner described above (Counts Ten, Eleven and Twelve; T. 86-92). Mr. Grimaldo corroborated the testimony of Mr. Perez (T. 97-97G). Several other witnesses testified about past similar transactions with Valerio Santos, which were not charged in the indictment (T. 116-128, 144-154, 164-177).

Francisco Mejia testified about a similar transaction with Salvador Santos as the vendor of the weapon (Counts Thirteen, Fourteen, and Fifteen; T. 63-67). Salvador Santos was charged with aiding and abetting a licensed firearms dealer.

In all of these transactions petitioners used the same *modus operandi*. A citizen of Texas accompanied an out of state purchaser who chose and paid for the weapon; the local citizens were named as purchasers on the Firearms Transaction Records. Although only Mr. Perez actually stated he was from out of state (T. 85-86), in all of the transactions the circumstances were such that the jury could properly find that petitioners either knew or had reasonable cause to believe that the actual purchasers were not residents of Texas.

The evidence on the conspiracy count (Count Sixteen) includes the numerous sales by Valerio Santos and the sale by Salvador Santos. Salvador Santos testified that his father, Valerio, had given him instructions on how to make firearms sales, although he claimed he was instructed to comply with the law (T. 282). This evidence was sufficient to show that Valerio Santos and his son conspired to have Salvador make illegal sales of weapons when he was running his father's store.

2. Petitioners contend that the persons who falsely signed as purchasers on the Firearms Transaction Records were accomplices of petitioners and that it was error for the trial court to fail to give a cautionary instruction as to their testimony. However, the purchasers were not accomplices because they could not have been indicted for the same crime as petitioners. *United States* v. *Nolte*, 440 F. 2d 1124 (C.A. 5), certiorari denied, 404 U.S. 862; *Risinger* v. *United States*, 236 F. 2d 96 (C.A. 5); See also *United States* v. *Farrar*, 281 U.S. 624 (purchaser of alcohol not liable under statute making it a crime to sell alcohol) and *Emmanuel* v. *United States*, 24 F. 2d 905 (C.A. 5), certiorari denied, 278 U.S. 643 (one who is brought into the country illegally is not liable under a statute making it a crime to bring a person into the country illegally). The cases cited by petitioners (Pet. 7) hold that one can be an accomplice where he could not have been a principal, but they were not criminal transactions necessarily involving two parties. In such a case where a particular criminal statute makes criminal the conduct of only one of the parties, the other party cannot be an accomplice. *United States* v. *Farrar, supra;* LaFave and Scott, *Criminal Law* 521 (1972); Perkins, on *Criminal Law* 621 (2d ed. 1969). As to the conspiracy conviction, there was no evidence of an agreement between the government witnesses and petitioners to violate the gun control.

Even if the purchasers were accomplices, it was not error for the court to fail to give a cautionary instruction on its own motion where petitioners' counsel did not request the trial court to give such a charge (Pet. 2). Following the charge, the court asked petitioners' counsel whether he had any additional requests or objections or exceptions. The defense attorney stated that he had none, and that he was satisfied with the charge as given (T.

404-405). Moreover, the testimony of each government witness was substantially corroborated by other government witnesses as to the procedure utilized by petitioners to make illegal sales. In addition, the documentary evidence (Firearms Transaction Records used in the purchases) further corroborated the testimony of the government witnesses. Where the testimony of an alleged accomplice is corroborated, the instruction on accomplice testimony is not required, *McDonald* v. *Sheriff*, 422 F. 2d 839 (C.A. 5); *Christy* v. *United States*, 261 F. 2d 357 (C.A. 9), certiorari denied, 360 U.S. 919.[2]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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[2] The cases cited by petitioners are inapposite (Pet. 7). In *United States* v. *Birmingham*, 447 F. 2d 1313 (C.A. 10), where accomplice testimony was involved, the court gave an instruction that the witnesses were presumed to be telling the truth; the court of appeals reversed on the ground that the instruction violated the accused's presumption of innocence. In *United States* v. *Owens*, 460 F. 2d 268 (C.A. 10), the testimony of the accomplice was uncorroborated.